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TPPA: INTELLECTUAL PROPERTY AND INFORMATION TECHNOLOGY

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Key Points: intellectual property; extension of copyright term; patent protections for medicines and biologics; individual liability for undoing “digital locks”; data flows versus data sovereignty.

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Negotiations for the Trans-Pacific Partnership Agreement (TPPA) among twelve negotiating countries – Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam – were concluded in Atlanta, USA on 5 October 2015. The text was released on 5 November 2015. The agreement has 30 chapters and many annexes, with parties also adopting bilateral side-letters. The TPPA was signed on 4 February 2016 in New Zealand, which is the formal depositary. Each party to the negotiations must complete its own constitutional processes and requirements before it can take steps to adopt the agreement. The TPPA will come into force within two years if all original signatories notify that they have completed their domestic processes, or after two years and three months if at least six of them, including the US and Japan and several other large countries, have done so. This research paper is part of a series of expert peer-reviewed analyses of different aspects of the text.

THE TPPA: INTELLECTUAL PROPERTY AND INFORMATION TECHNOLOGY

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KEY POINTS

Intellectual Property

- TPPA provisions on intellectual property are a net cost to New Zealand citizens and businesses. There are significant financial costs, and more significant lost opportunities, with some rules limiting our ability to experiment and innovate.
- The text has improved over time. Compared with leaked earlier drafts, the final text involves reduced restrictions and lower costs to New Zealand.
- The final impact of the TPPA depends in part on whether we make full use of allowed exceptions, New Zealand can and should adopt these exceptions.

Copyright

- Increases to copyright term under the TPPA are estimated to cost New Zealanders at least $55 million a year on average. Official analysis equates this with an up-front cost of $500 million dollars.
- The same analysis notes that these copyright cost estimates are uncertain, and are likely to be underestimates.
- Opening “digital locks” on copyright content, including purchased content, will mean risking personal liability.

Medicines and biologics

- The TPPA requires data exclusivity for biologic medicines either for a term of eight years, or a shorter term with unspecified other measures to ensure a “similar market outcome”. New Zealand’s current five year term may be challenged by the US. Extended protection for biologics would add to the cost of some treatments, resulting in higher costs for patients or the tax-funded health system.
- New biologic treatments would be eligible for longer patent terms. This may not happen often, but when applied would delay access to cheaper generic versions.

Software Patents

- New Zealand can continue to exclude patents for pure software under the TPPA.

The Internet and Data Flows

- New Zealand could retain its existing “graduated response” regime, where ISPs pass on copyright notices to customers for file sharing.
- TPPA rules make it easier for business to move information overseas, but limit potential restrictions and protections for user data.
- Our .nz domain registry is independent from government. TPPA domain name provisions, though consistent with current practice, are a wrinkle on this independence.

Innovation and Exports

- Overall, TPPA rules on intellectual property do not assist innovation. Benefits go mainly to established, overseas companies, not new or rapidly growing businesses.
- New Zealand technology businesses may benefit from opening of TPPA markets.

IP and IT: The New Zealand Context

This document summarises the TPPA's provisions on intellectual property and information technology as they affect New Zealand. A long-negotiated trade agreement, the TPPA presents a set of benefits and costs to each potential member nation. We focus on provisions found in TPPA Chapters 18 "Intellectual Property", 13 "Telecommunications", and 14 "Electronic Commerce", offering an initial view on the most significant changes required. Constraints of time and scope mean this analysis is neither comprehensive nor final. A review of the TPPA as a whole is not attempted.

For New Zealand, TPPA provisions in this area involves a number of concessions and costs. Despite our "number 8 wire" ambitions, we remain a net importer of commercial intellectual property.[1] In general, books we learn from, movies we enjoy, and medicines which heal us are purchased overseas. The TPPA would extend owners' exclusive rights to these products, meaning that over time and on average, we pay more for them. That is a cost to us as consumers, as taxpayers, and as businesses. As one example, extended terms for copyright and certain patents offer immediate benefits to established, mainly overseas owners. New Zealand businesses, particularly where new or growing, benefit less and later.

Existing agreements are another key part of the New Zealand context. Over recent decades, New Zealand has joined international trade arrangements. A small player, we may gain more from joining than from going it alone. We are engaged in the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO). On the other hand, we resolve some issues in our own way, setting local norms for what we want, what we accept, and who pays the bill.[2] We are unique in that:

- Being small and remote, the tyranny of distance is uniquely important for New Zealand. Its overthrow by the Internet is significant for our commerce and culture.
- The place of Māori and the Treaty of Waitangi are fundamental to our constitution, and this affects our balancing of rules. Treaty settlements and Waitangi Tribunal reports have acknowledged Māori knowledge as a protected taonga,[3] and resulted in Māori-held broadcast spectrum.[4]
- We have a single-buyer of subsidised medicines in Pharmac, our government agency which approves treatments, allocates subsidies, and negotiates drug prices.

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1 See Sir Paul Callaghan's speech to Treasury "Breaking the Mold: Can New Zealand increase its wealth via the high technology route?", <http://www.treasury.govt.nz/publications/media-speeches/guestlectures/pdfs/tgls-callaghan.pdf/at_download/file>

2 As one example, New Zealand has not yet joined the WIPO "Internet Treaties" – the WCT and WPPT. The TPPA would require us to join these treaties, presumably as a trade for other gains.

3 Waitangi Tribunal, WAI262, "Report of the Waitangi Tribunal into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity" (2011).

4 Waitangi Tribunal, WAI 26 "Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies"(1990), <http://www.justice.govt.nz/tribunals/waitangi-tribunal/Reports/wai0026>

- Our patent system excludes software patents, barring software "as such" from patent protection. Vigorous lobbying from the ICT sector supported this move.
- We have our own copyright safe harbour for internet service providers, who are protected from liability if they apply a "graduated response" enforcement regime.
- We allow parallel importation of goods, and multizone DVD players, reflecting concerns that international suppliers may not provide our wants domestically.
- The privatisation and later separation of Telecom shapes our telecommunications market. Legal obligations to provide phone line and phone service coverage, once held by Telecom, have passed to network owner Chorus and service retailer Spark.
- Our Internet and mobile connectivity is fast and widespread, reaching most of our population, though access can be expensive by international standards.

Lost opportunities

TPPA rules on intellectual property and information technology reflect concessions to the interests of other parties. There are both measurable financial costs, and unmeasurable thousands of opportunities lost. To develop high value businesses, and to strengthen a distinctive local culture, we must become clever, like the demi-god Maui of Māori lore.[5] How can we gain this cleverness? Surely in part through access to learning, through reinterpreting cultural materials, and through tinkering with new technologies.[6] TPPA extensions to copyright term and liability around "digital locks" affect these activities. The risk of ISDS claims by overseas businesses, even if only perceived, may limit our policy options.

On the positive side, the final text is better than the early drafts. This was always an area where New Zealand would be called on to make concessions. Over time these concessions have become less dramatic. There is language recognizing the interests of users, and the importance of balance.[7] The most costly rules are subject to exceptions. If the Agreement is finally implemented, the challenge for New Zealand is to make use of those exceptions, creating a space for our innovative capacities to grow.[8] As consumers, as creative re-workers of content, and as citizens, we can demand that our government use these exceptions to protect our creative potential.

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5 For a story of Maui tinkering, see "How Maui brought fire to the world", <http://eng.mataurangaMaori.tki.org.nz/Support-materials/Te-Reo-Maori/Maori-Myths-Legends-and-Contemporary-Stories/How-Maui-brought-fire-to-the-world>

6 See Barry Coates et al, "The Economics of the TPPA", <https://tpplegal.files.wordpress.com/2015/12/ep5-economics.pdf> at footnote 29, referring to a leaked 2010 paper from New Zealand to the TPPA negotiations which at page 2 warned against "overprotection" of intellectual property becoming a barrier to innovation: <http://www.citizen.org/documents/NZleakedIPpaper-1.pdf>

7 Articles 18.2, 18.66.

8 In Māori origin stories, Tane Mahuta separated the earth and sky to make space for the world we live in. See Te Ara, "Te Waonui a Tāne", <http://www.teara.govt.nz/en/te-waonui-a-tane-forest-mythology/page-1>

Intellectual Property Under TPPA

Background and Definitions

"Intellectual property" in the TPPA refers to several different legal rights.[9] All of these rights have current protections in New Zealand law. The most well known are copyright, trade marks, and patents.[10] Also included are geographical indications, industrial designs, plant variety rights, circuit layout designs, and trade secrets.[11] In each case, the owner can exclude others from doing certain acts. This exclusivity protects the owner's products against direct copying or imitation, a protection which may have significant commercial value.

Harmonisation and International Agreements

Intellectual property rights can support global businesses. Yet rules controlling intellectual property are mostly enforced under country-by-country domestic law. Much of this domestic law has been harmonised by international agreements, under which countries like New Zealand protecting things invented or created overseas under local law.

Current Treaties

New Zealand is party to prior agreements affecting intellectual property. These are governed primarily through the World Trade Organisation (WTO) and the World Intellectual Property Organisation (WIPO). Internationally, baseline intellectual property rules are set by the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), which is administered by the WTO and governs all WTO members.

If adopted, the TPPA would exist outside these processes. It would set detailed intellectual property rules applying to TPPA members alone, creating a new order within and layered on top of WTO and WIPO agreements. In particular, TRIPS definitions are used throughout TPPA Chapter 18, and existing TRIPS rules may modify the apparent scope and meaning of the TPPA text.

Beyond TRIPS, Article 18.7 of the TPPA requires parties to join key international agreements. New Zealand is already a party to several of these agreements, directed to recognition of overseas

9 Article 18.1 refers to "all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement".

10 Respective law: Copyright Act 1994; Trade Marks Act 2002; Patents Act 2013.

11 Respective governing law: Geographical Indications (Wine and Spirits) Registration Act 2006; Registered Designs Act 1953; Plant Variety Rights Act 1987; Layout Designs Act 1994. Trade secrets and other confidential information are protected by the common law rather than a statute.

created IP through "national treatment",[12] and to standardised international filing processes.[13] This provision requires us to join several new agreements.

Budapest Treaty

The Budapest Treaty sets standards for recognising microorganisms in patent processes. New Zealand patent law already recognises Budapest applications from overseas,[14] and would allow us to join the Budapest Treaty by implementing new regulations.[15]

UPOV Convention

The UPOV Convention recognises exclusive rights in plant breeds. As with patents, overseas plant varieties can be protected provided a local application is filed in time. Recognising the significance of indigenous plants to Māori, New Zealand has negotiated an exception.[16] New Zealand may adopt local measures which are necessary to protect Treaty of Waitangi rights in indigenous plants. The government's interpretation of its obligations under the Treaty of Waitangi cannot be challenged, and is a domestic issue for New Zealand. However, whether this applies only to state-state disputes, or also to investor-state disputes is currently under consideration by the Waitangi Tribunal, and the government's response can still be challenged as being 'arbitrary or unjustified discrimination' towards a person or firm from another TPPA party. Rather than joining the UPOV Convention, New Zealand may give effect to it through a separate plant variety rights system.[17] We have such a system already, though the TPPA requires changes.[18]

WIPO Internet Treaties

The WIPO Copyright Treaty (WCT) requires New Zealand to extend liability for breaking TPM "digital locks" on copyright content. The WIPO Performers' and Phonograms Treaty (WPPT) requires recognition of performance and broadcast rights. TPPA Articles 18.60-18.62 and 18.68 substantially reiterate these changes and are examined in detail below.

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12 The Paris Convention (1967) recognises overseas-filed patents and designs. The Berne Convention (1971) recognises copyright works created overseas and requires 50-year minimum copyright terms.

13 The Patent Cooperation Treaty (1979) establishes a streamlined international filing process for patents. The Madrid Protocol (1989) and Singapore Treaty (2006) establish similar processes for trade marks.

14 Patents Regulations 2014, r 59.

15 Patents Act 2013, s 243

16 Annex to Article 18.7.2 at 2.

17 Annex to Article 18.7.2 at 1(b).

18 Plant Variety Rights Act 1987. Further discussion of te Tiriti and the TPPA is included in 'Māori Rights, te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement' https://tpplegal.files.wordpress.com/2015/12/ep3-tiriti-paper.pdf

Excluded Agreements

The TPPA obliges members to join international agreements which extend intellectual property rights for owner businesses, but not agreements which support rights of access for users. One example is the Marrakesh Treaty, requiring copyright exceptions to support access to print material for people who are blind or otherwise suffer a print disability.[19] TPPA member nations can still join Marrakesh, but are not obliged to by the TPPA text.

Copyright

Under copyright law, owners of qualifying "original works" may stop others from copying or distributing those works.[20] These "works" include almost any item which conveys information or artistic meaning.[21] For example, "literary works" include any original writing: a play script, the present document, computer source code, or a short text message.[22]

Copyright Term Extension

Under Article 18.63, the TPPA requires minimum copyright terms of 70 years, or the author's life plus 70 years for literary, dramatic, musical, or artistic works.[23] Compared with New Zealand's current law and prior international agreements,[24] this provision extends the term of copyright by 20 years.

Economic costs

The TPPA requires copyright term extensions in New Zealand. This benefits owners of relatively old copyright works, mostly based overseas, at the cost of New Zealand consumers and businesses. MFAT has financial estimates for an average of $55 million per year.[25] This is a significant economic loss. Analysis for MFAT suggests that this is equivalent to an up-front cost of $500 million,[26] but

19 New Zealand officials are consulting on the Marrakesh Treaty: http://www.mbie.govt.nz/info-services/business/intellectual-property/copyright/the-marrakesh-treaty

20 Copyright Act 1994, s 16.

21 Under s 14(1), works include literary, dramatic, musical or artistic works, sound recordings, films, communication works, and typographical arrangements.

22 "Originality" refers to new expression rather than new ideas, and the threshold is low. See for example Crocodile International Pte Ltd v Lacoste [2015] NZHC 2432 at [102].

23 The Berne Convention requires terms for literary, dramatic, musical, or artistic works to be based on the author's life. TPPA Article 18.63 requires "life plus 70 years" where term is based on a person's life.

24 New Zealand is party to the Berne Convention for the Protection of Literary and Artistic works, the Universal Copyright Convention, and the Agreement on the Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement).

25 MFAT sheet above.

26 Analysis for MFAT calculates the net-present-value of these costs at $208-239 million for recorded music and $263-300 million for books. See MFAT econ analysis, p 1.

admits that this is almost certainly an underestimate.[27] That analysis does not separately consider video media, games, or software, and relies on estimates for sound recording to accurately reflect increased costs in those areas. Increased costs on business are ignored in the MFAT analysis.[28] This misses the significance of copyright materials as an input to businesses, particularly software and communications businesses.

Extending copyright terms increases profits for holders of existing valuable works. It does not provide a significant incentive to create new works.[29] The difference between a 50-year and a 70-year term occurs decades after the act of creation, offering a much delayed and highly uncertain financial return for creators. In contrast, holders of existing valuable rights gain a windfall of 20 extra years of sales, with no extra creative output.

Effects on students, educators, and research

The education sector is a large user and creator of copyright content. As one example, the University of Auckland generates over $1bn in revenue, but spends in excess of $17 million to access copyright content. This content is provided largely by European and U.S. publishers and aggregators in digital form, with licences allowing copying for teaching purposes.[30] An extended copyright term means content aggregators and reproduction rights organisations can demand an increase in fees: the usage paid for is now extended by 20 years. This is a large export of funds, costing universities and ultimately taxpayers. Universities are financially constrained. Paying licence fees for a longer duration will in practice mean reduced academic library collections, and poorer access to materials for researchers and students.[31] This is a barrier to world-leading academic work, and training of skilled graduates. To that extent, copyright extension is a small, but significant drag on the skills of New Zealanders.

27 Concept Economics, “Economic Modelling on Estimated Effect of Copyright Term Extension on New Zealand Economy”, <http://tpp.mfat.govt.nz/assets/docs/TPP - Analysis of Copyright term extension, explanatory cover note.pdf>, p 26.

28 Ibid, p13.

29 Ibid, p 6.

30 The University of Auckland Library, Te Tumu Herenga, “Annual Report 2014” accessed on 25 November 2015 from: http://www.library.auckland.ac.nz/sites/public/files/documents/annual-report.pdf

31 Research Libraries UK, “The value of libraries for research and researchers” page 55, accessed 4 December 2015 from: http://www.rluk.ac.uk/wp-content/uploads/2014/02/Value-of-Libraries-full-report-.pdf

Orphan works

"Orphan works" are copyright works whose owner cannot be identified or contacted. Copyright law stops others from using these works, though there is often a strong argument that owners are not harmed by such use. As a potential option for limiting the impact of extended terms, TPPA members could require registration for the copyright period beyond the Berne convention standard of 50 years or life plus 50 years.[32] This is possible because a 'no formalities' provision seen in earlier proposals for the TPPA is not included in the final text.[33]

Performer's rights

The TPPA creates rights for performers whose works are fixed in sound recordings.[34] Article 18.60 gives performers along with "authors" the right to control distribution of sound recordings. Article 18.61 confirms that this right is equal to the rights of authors. For most commercial sound recordings, this means use requires permission from two parties. This expands on current New Zealand law, which currently gives performers a similar right only where recordings are made without their consent.[35] The existence of multiple parallel copyright interests makes it more difficult to use works. For example, under current law, a café wishing to play recorded music needs permission from both the writer and the performer. Collecting societies are moving to a unified process to avoid this difficulty.[36]

New offences for breaking TPM "digital locks"

A Technical Protection Measure (TPM) bars unintended modes of access to copyright works – it is in effect a "digital lock". Rules protecting TPMs create a "para-copyright": a legal right which sits alongside copyright, but which operates independent of intent or infringement.[37] As technical rather than legal restraints, these devices may not recognise allowed exceptions or expiry of copyright term, preventing uses of works which the law would allow.

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32 Maria Pallanate, 'The Next Great Copyright Act' [2013] 36(3) *Columbia Journal of Law and the Arts* 315 in Kimberlee G. Weatherall. 2015. "Section by Section Commentary on the TPP Final IP Chapter Published 5 November 2015 – Part 2 – Copyright" The Selected Works of Kimberlee G. Weatherall. Available at: http://works.bepress.com/kimweatherall/32

33 Kimberlee G. Weatherall. 2015. "Section by Section Commentary on the TPP Final IP Chapter Published 5 November 2015 – Part 2 – Copyright" p 12, The Selected Works of Kimberlee G. Weatherall. Available at: http://works.bepress.com/kimweatherall/32

34 Under Article 18.57 "performance" is limited to a "phonogram" or sound recording.

35 Copyright Act 1994 (NZ), sections 170-174.

36 OneMusic, "Do I need a licence?", < https://www.onemusicnz.com/licence-info/do-i-need-a-licence>, accessed 10 January 2016.

37 Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58, (2005) 224 CLR 193, (2005) 221 ALR 448, at [16].

New Zealand's current TPM rules are linked to copyright infringement. Current law prohibits the supply, in the course of business, of devices or services which enable others to break TPMs.[38] Criminal penalties are significant, but cover only those who know infringement is likely to result.[39] Accessing content for non-infringing purposes is allowed. For example, an overseas-purchased Blu-ray DVD may be viewed with the aid of a region-unlocking circumvention device – viewing the content is not copyright infringement.[40]

TPPA rules in Article 18.68 go further, requiring legal liability for anyone who supplies devices or services for breaking TPMs,[41] or who "knowingly circumvents" a TPM.[42] The definition of TPM is broad, including a device which controls access to a protected work. Adopting this provision would mean preventing access, and introducing new liability for the act of circumvention. These rules extend to products such as games, streaming media, e-books, and indeed any software or other digital product. There are exceptions, whose interpretation is complicated by somewhat opaque language. The final scope of these provisions would depend on whether, and in what form, New Zealand uses these exceptions to confine liability for breaking TPMs.

Liability for ISPs and other intermediaries

Internet service providers and other communication services risk copyright liability due to actions of users who access or publish content. If providers are liable, they are likely to aggressively filter content or withhold access, harming everyone's ability to communicate. Current New Zealand law provides a "graduated response" regime. Service providers are protected from copyright liability where they remove alleged infringing content,[43] and where they pass infringement notices on to users.[44]

The TPPA provides a broadly similar framework. As with other areas, measures favouring rights-holders are mandatory, and those offering balance are optional.[45] Unlike earlier drafts, the TPPA does not require that "repeat infringers" be banned from a service,[46] a move which would have paralleled the controversial, now-repealed s 92A of New Zealand's Copyright Act 1994. As it stands, New Zealand's current regime is likely at the user-favourable end of what the TPPA would allow.

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38 Copyright Act ss 226, 226A-E.

39 Copyright Act s 226C.

40 See Copyright Act s 226(b), where TPMs do not include measures which only control access for non-infringing purposes.

41 Article 18.68(b).

42 Article 18.68(a).

43 Copyright Act 1994 (NZ), s 92C.

44 Copyright Act 1994 (NZ), s 122G.

45 Bridy, Annmarie, "A User-Focused Commentary on the Trans Pacific Partnership ISP Safe Harbors", 23 November 2015, < http://infojustice.org/archives/35402>

46 Bridy, Annmarie, "A User-Focused Commentary on the Trans Pacific Partnership ISP Safe Harbors", 23 November 2015, < http://infojustice.org/archives/35402>

Canada negotiated a specific exception to avoid adopting a "take down" regime. However, there is concern that as worded this will not protect Canada's current approach.[47]

Patents and Designs[48]

Patent law protects new inventions, providing an exclusive right to make, use, or sell the protected invention for a standard term of up to 20 years. After this period, exclusive rights of the patent owner expire, and others can use or sell the invention.

Registered designs protect visible design elements of consumer products such as teapots or smartphones. TPPA rules at 18.55 and 18.56 appear in line with New Zealand arrangements.

Software patents

There has been public concern that the TPPA would change New Zealand law on software patents. Current New Zealand law does not allow patents for pure software. Following local debate, our Patents Act 2013 excluded software from patent protection,[49] stating "a computer program is not an invention".[50]

TPPA Article 18.37 restates standard limits on patentability,[51] and requires parties to allow patents "for any invention … in all fields of technology". At first glance, this might seem to require a change in New Zealand law. However, this is very similar to the TRIPS wording in Article 27, with which our software patent rules presumably comply. Neither TRIPS nor the TPPA further define an "invention", which suggests that our domestic exclusion of software "as such" would not be affected.

Patents for human biology and medical treatments

New Zealand patent law excludes some types of invention for ethical reasons, particularly in medicine and human biology. Excluded from patent are medical treatments, medical methods of diagnosis, human beings, and biological processes for making human beings.[52] Treatment exclusions mean doctors and others can apply the most effective treatments without risking patent liability. These exceptions are allowed for under Article 18.37.

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47 Geist, Michael, "Why the TPP Creates a Backdoor Copyright Takedown System", October 13 2015, <http://www.michaelgeist.ca/2015/10/why-the-tpp-creates-a-backdoor-copyright-takedown-system-in-canada/>

48 Material on patent term and data exclusivity is contributed by Kate McHaffie & Jo Shaw of AJ Park.

49 Patents Act 2013, s 11. Examples indicate that software can be a component in an invention, for example where software for a washing machine is "an improved way of washing clothes".

50 Patents Act 2013, s 11(1). This section also uses traditional "manner of manufacture" wording.

51 To gain patent protection, an invention must be new, must involve an inventive step beyond what was obvious at the time of filing, and must have some potential commercial use.

52 Patents Act 2013 (NZ), s 16.

Grace Period

In New Zealand law, patent rights depend on filing before making an invention public. TPPA Article 18.38 would change that, introducing a 12-month grace period. This means an invention can be made public, and then protected under a patent filed up to 12 months later.

Extension in Patent Term

Spending on patented pharmaceuticals is a substantial proportion of New Zealand's health budget. When relevant patents expire, "generic" versions of a drug can be made without the owner's permission, usually allowing treatment at lower cost. The TPPA requires New Zealand to make patent term extensions available for pharmaceutical product patents in the following circumstances:

1. Where there has been unreasonable curtailment of the effective patent term (ie, the period during which the patentee can legally supply the patented product) due to the Medsafe approval process; or
2. Where there have been unreasonable delays in the grant of the patent by the Intellectual Property Office of New Zealand.

The agreement does not define what 'unreasonable' means. It also does not specify how long an extension must be given. In practice, as our patent office meets relatively short timeframes for marketing approval, patent examination, and grant of patents, patent term extensions are likely to be very rare in New Zealand.

Extensions in data exclusivity

Data exclusivity is separate from patent protection. Pharmaceutical products must have safety approval from MedSafe to be marketed in New Zealand. During a "data exclusivity" period, a manufacturer of a generic pharmaceutical product may not rely for this purpose on the safety and efficacy data generated by original product manufacturer. Costs of generating this data can be significant, and an exclusivity period ensures that regulatory requirements will not immediately aid an originator's competitors. If the data exclusivity period extends beyond the patent term (which occurs very seldom), generic products cannot be sold due to marketing exclusivity. In effect, the original supplier may get a longer exclusive right to sell. The TPPA requires New Zealand to extend its data exclusivity period for agricultural chemical products, but not for most pharmaceutical products.

The position on "biologics" is less clear. "Biologics" are biological therapeutic or medicinal products, made in or from biological sources. Examples include vaccines, tissues, and somatic cells. Biologics can be complex mixtures of material, which may allow a competitor to produce a "biosimilar" product, with slightly different composition but largely similar therapeutic results.[53] The difference in composition may be enough to get around a patent, making data exclusivity important. The USA sought a 12-year data exclusivity period in relation to biologics.

53 Tim Jackson and David Koedyk, Baldwins, "Piggy-backing to market? TPP negotiations bring data exclusivity periods of biologics into public spotlight" 7 September 2015.

The final agreement requires either (a) an 8-year term, or (b) a minimum term of five years, together with "other measures" which result in a similar market outcome to an 8-year term. A 5-year term is in line with current New Zealand law, however the text on "other measures" is unclear, creating uncertainty. It is hard to see how we could prove a "similar outcome" via "other measures" compared with an 8-year term. A review of these terms is required after 10 years, meaning this argument will be reopened.[54]

Trade Marks

Registered trade marks protect exclusive rights in a name, logo, or other branding which identifies a specific business. New Zealand's Trade Marks Act 2002 allows registration of "signs" which can be represented graphically, and which can serve to distinguish one supplier from another.[55] The TPPA requires a broader range of registrable trade marks than TRIPS. Members must not bar registration of sounds, and must use "best efforts" to register smells.[56]

In our view, these requirements are met by current New Zealand law.[57] Under the Trade Marks Act 2002, registrable trade marks include sounds and, in principle, smells.[58] However, smells in particular are difficult to describe graphically. None are currently registered as trade marks in New Zealand.[59]

Well-known marks

The TPPA requires protections for "well known" trade marks, even where they have never been applied for or registered in the relevant country.[60] This protects famous brands against uses of similar marks even on dissimilar products. Such protections are already found in New Zealand law.[61]

54 TPPA Article 18.52 at 3.

55 Trade Marks Act 2002, s 2, definition of "trade mark".

56 Article 18.18.

57 Weatherall TPP Analysis Part 1, Article 18.18, p 20.

58 Trade Marks Act 2002, s 2, definition of "sign".

59 A search of the IPONZ trade mark register found four scent mark applications, all cancelled or abandoned.

60 Article 18.22.

61 Section 25(1)(c) of the Trade Marks Act 2002 prevents registration of a mark which is similar to any mark "well known" in New Zealand. Under s 89(1)(d) of the Trade Marks Act 2002, use on dissimilar goods and services infringes if there is "unfair advantage" or detriment to the well known mark.

Geographical Indications

Registered "geographic indications" protect rights over place names which indicate product type or quality. Legal rules vary. Europe has a very high degree of protection, limiting terms such as "champagne" or "parmesan" to traditional products from the named regions.

Current New Zealand rules align with TRIPS and are limited in scope. Our Fair Trading Act 1986 restricts the misleading use of geographic terms.[62] The Geographical Indications (Wines and Spirits) Act 2006, not yet in force, would allow for place names relating to wines and spirits to be registered.[63] There is potential for overlap with registered trade marks. In the event of a conflict, current New Zealand law would favour the first-filed application for either type of right.[64]

The TPPA seeks to limit protection for geographic indications. This prevents TPPA members from adopting the more extensive protections which exist in Europe. However, as Kim Weatherall points out, the TPPA defines geographic indications in terms of "members' territory".[65] As European nations are not members, their geographic indications are not effectively excluded by the current text.

If given effect, TPPA rules prevent members from aligning with Europe on geographic indications. As Weatherall suggests, this limits potential trade arrangements with Europe. New Zealand might consider Europe-style geographic indications as an exchange for trade gains. That option would be foreclosed by intended TPPA rules.

Trade Secrets

"Trade secrets" refer to private information which is valuable to a business. The TPPA provides for criminal penalties and processes where trade secrets are accessed without authority via a computer system.[66] New Zealand law has existing computer crimes provisions, which cover unauthorized access and are likely sufficient for TPPA purposes.[67] Concern has been expressed that this would stop legitimate whistleblowers reporting fraud or environmental damage.[68] This would

62 Section 9 bars "misleading and deceptive" conduct in trade generally.

63 Geographical Indications (Wines and Spirits) Act 2006, s 2.

64 Henry Hughes (Patent & Trade Mark Attorneys), "Trade Marks, Geographical Indications, and the TPP", <http://www.henryhughes.co.nz/Site/News_Articles_Case_Notes/Trade-Marks-Geographical-Indications-and-the-TPP.aspx>

65 Article 18.1 copies the "originating within the territory of a Party" definition from TRIPS, but TPPA members are a small group within TRIPS.

66 TPPA Chapter 18, Article 18.78.

67 Crimes Act 1961 (NZ), s 249.

68 See Jeremy Malcolm, "Heightened Trade Secrets Restrictions Could Chill Global Speech" (September 14, 2015) on the EFF Deeplinks Blog < https://www.eff.org/deeplinks/2015/09/heightened-trade-secrets-restrictions-could-chill-global-speech>

depend on implementation – TPPA rules allow member nations to confine liability and penalties to specific situations such as acts "for commercial advantage or financial gain" or acts "directed by ... a foreign economic entity".[69] New Zealand could comply while allowing whistleblowing in the public interest.

Te Tiriti O Waitangi – The Treaty of Waitangi

The 1840 Treaty of Waitangi is fundamental to the relationship between New Zealand's government and Māori. Concerned that TPPA changes prejudice their interests, Māori groups have approached the Waitangi Tribunal. Statements of claim include Māori intellectual property as an affected right.[70] Current intellectual property law acknowledges Māori interests.[71] Among the risks is that investor-state disputes may tie government hands, preventing moves to further protect Māori interests – see the companion paper at https://tpplegal.files.wordpress.com/2015/12/ep3-tiriti-paper.pdf.

Enforcement

Chapter 18 includes enforcement provisions. These shift existing balances towards easier assertion and enforcement of intellectual property rights through court processes. This assists rights-holders, but also creates risks that processes will be abused. For example, Article 18.72 creates presumptions which lessen the need for evidence from rights-holders to show infringement. Combined with extensions in rights, there is a risk that enforcement rules support bullying or "trolling" behaviour, where businesses exist to threaten and litigate rather than to produce and sell products.

Some enforcement provisions create risks for businesses. Border measures, drafted in terms of "suspected counterfeit or pirate goods" may in fact be applied by business competitors to frustrate or gain intelligence on their competitors.[72] There are also difficulties with goods in transit where national intellectual property rules differ.[73] For example, a drug en route to New Zealand, but patented in Australia could be seized by Australian officials, even though its ultimate import and use in New Zealand is lawful here.[74]

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69 TPPA Article 18.78 at 3.

70 See K. Ertel, A. Sykes, R. Zwan, "Statement of Claim in relation to WAI2522" at [27], <https://tpplegal.files.wordpress.com/2015/08/statement-of-claim-re-inquiry-into-the-trans-pacific-partnership-agreement-dated-23-june-2015.pdf>

71 For example, trade marks offensive to Māori cannot be registered.

72 Kim Weatherall, IP Chapter Analysis Part 3, p 39.

73 Kim Weatherall, IP Chapter Analysis Part 3, p 40.

74 Ibid.

Enforcement against third parties

Requirements for injunctions do not extend to non-infringing third parties, such as Internet service providers or website hosts.[75] However, Article 18.77 requires criminal liability for "aiding and abetting" criminal acts of infringement. If not implemented carefully, this could create liability risks for online platforms such as TradeMe.[76] For some of these rules, scope depends on local interpretation. For example, Article 18.74 requires judicial authority to seize items "suspected of being involved in ... prohibited activity": the relevant "suspicion" might be interpreted broadly or narrowly.[77]

Criminal Provisions

Article 18.77 requires criminal procedures and penalties for "willful trademark counterfeiting or copyright or related rights piracy on a commercial scale". For copyright and related matters, "commercial scale" includes (a) all acts carried out for financial gain, as well as (b) significant acts which prejudice the rights-holders interests in the market, even if not done for gain. Available penalties must include imprisonment, and fines "sufficiently high to provide a deterrent".[78] Current New Zealand law meets these requirements. Section 131 of the Copyright Act 1994 allows for fines of up to $10,000 per infringing copy with a limit of $150,000 per transaction, or for imprisonment for up to 5 years.[79]

Statutory Damages

Article 18.74 sets required remedies in civil cases for infringement of copyright or trade mark rights. There has been concern that this requires set statutory damages, which can mean defendants face large monetary claims.[80] Fortunately, Article 18.74 provides member nations with an option of either "pre-established damages" or "additional damages". Amounts of statutory damages need not be as high as those found in the United States.

Current New Zealand law allows for exemplary damages where a defendant's conduct is wilful or with disregard for the plaintiff. This satisfies the requirement for additional damages,[81] meaning we need not adopt pre-established statutory damages.

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75 Kim Weatherall, IP Chapter Analysis Part 3, p 14.

76 Kim Weatherall, IP Chapter Analysis Part 3, p 53.

77 Kim Weatherall, IP Chapter Analysis Part 3, p 30.

78 TPPA Chapter18, Article 18.77 at 6(a).

79 Copyright Act 1994 (NZ), s 131(5).

80 See Jonathan Band, "Flexibility in the TPP Statutory Damages Provision" (November 25, 2015) <http://infojustice.org/archives/35434>

81 TPPA Chapter 14, footnotes 111 and 112.

Domain Names[82]

Domain names are addresses for content on the Internet. They are allocated by domain registries. The country-code registry for New Zealand is ".nz". Like many registries, .nz is operated independent from any government. The not-for-profit InternetNZ is the delegated manager for .nz,[83] and policy for .nz is created and managed by the Domain Name Commission.[84]

TPPA Article 18.28 requires member nations to provide, for their top level country-code domains, a dispute resolution procedure and a reliable online database of contact information for those who have registered domains. The Domain Name Commissioner provides dispute procedures and a registrant database for .nz, and is confident that these meet TPPA requirements. In substance, this provision seems to require no change here. However, it is concerning that this rule is included in a trade agreement at all. In general, country-code domains are not controlled by national governments, but delegated by the Internet Assigned Numbers Authority (IANA).[85] A government forcing compliance with TPPA standards would compromise the independence of its national registry.

Intellectual Property and Investor State Disputes

Should TPPA provisions be breached, provisions on Investor-State Dispute Settlement (ISDS) may be triggered. These are found in Chapter 9, and protect activities defined as "investment" in a member nation, which can include rights in intellectual property.[86] As drafted, protection under Chapter 9 requires "the characteristics of an investment" such as "the commitment of capital", "the expectation of gain or profit", or "the assumption of risk". [87] Merely owning or controlling a right in intellectual property may not be enough to satisfy these characteristics.

Actual or potential claims for ISDS arbitration may limit our domestic policy choices. Canada has faced 38 investor actions under the North American Free Trade Agreement (NAFTA).[88] Of particular relevance is Eli Lilly's claim for $500 million, highlighted by Susy Frankel.[89] Eli Lilly held

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82 We thank the Domain Name Commissioner, Debbie Monahan for material in this section.

83 InternetNZ is an independent not-for-profit. The lead author of this paper is employed by InternetNZ, which has sponsored this paper by providing his time.

84 The Domain Name Commission is a wholly-owned subsidiary of InternetNZ. See <http://dnc.org.nz/>

85 IANA controls the root nameservers for the Internet, serving as the "Internet phonebook of last resort". See <http://www.iana.org/about>

86 TPPA Chapter 9, Article 9.1, definition of "investment" at (f).

87 Definition of investment.

88 Global Affairs Canada, "NAFTA - Chapter 11 - Investment" http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng

89 Susy Frankel, "The Impact of TPP and Trade Agreements on Copyright and Investment in the Creative Economy", Keynote address to the Asian Pacific Copyright Association, 27 Nov 2015.

two Canadian patents for new medical uses of an existing medicine. Decisions of Canadian courts, interpreting the common law concept of "utility", made these patents invalid. Eli Lilly pursued arbitration under NAFTA, seeking $500 million.[90]

Such cases are expensive to defend and create uncertainty for future governments. On the other hand, officials say the risk of ISDS claims against New Zealand is low.[91] Any risk may be reduced to some extent compared with NAFTA, as any claim under Chapter 9 requires "characteristics of investment" which seem more restrictive than those found in NAFTA.[92] However, these "characteristics" would themselves be the subject of disputes in interpretation. Even if no claims are made, future governments may restrict their policy to avoid the uncertain risks of ISDS.

Electronic Commerce and Data Flows

Chapter 14 recognises "economic and growth" opportunities provided by electronic commerce,[93] setting rules to support open data flows between TPPA member nations. In the background are questions of data mobility versus data sovereignty.

Rules in Chapter 14 overlap with Investment, Cross-border Trade in Services, and Financial Services Chapters, and are subject to exceptions found elsewhere in the TPP.[94] A key exception is information provided for or held by government, which is excluded from Chapter 14, but subject to other listed Chapters.[95] As a result, TPPA data flow provisions are narrower than those in other multilateral agreements now being negotiated, such as the Trade in Services Agreement (TISA).[96]

Data Flows versus Data Sovereignty

Data held in or processed by computers has become increasingly important to people's personal and professional interactions. With free data flows, information moves between countries where expectations and legal requirements vary. Local laws cannot easily control offshore data. This

90 Gold, E. Richard and Shortt, Michael, The Promise of the Patent in Canada and Around the World (November 24, 2013). 30:1 Canadian Intellectual Property Review 35 (2014). Available at SSRN: http://ssrn.com/abstract=2361146 or http://dx.doi.org/10.2139/ssrn.2361146

91 See MFAT, "Trans-Pacific Partnership National Interest Analysis" (25 Jan 2016) at 4.8.2 <https://www.tpp.mfat.govt.nz/assets/docs/Trans-Pacific%20Partnership%20National%20Interest%20Analysis,%2025Jan2016.pdf>

92 See NAFTA Trilateral, definition of "investment" in NAFTA Chapter 11 < https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=1&secid=539c50ef-51c1-489b-808b-9e20c9872d25#A1139> and Amokura Kawharu 'TPPA: Chapter 9 in Investment' https://tpplegal.files.wordpress.com/2015/12/tpp-investment.pdf

93 Article 14.2.

94 http://www.citizen.org/documents/tpp-ecommerce-chapter-analysis.pdf

95 Article 14.2, 3(a).

96 Ibid. See also Ministry of Foreign Affairs & Trade, "Trade in Services Agreement (TiSA)", https://mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/tisa/

has led for calls to require local data storage or “data sovereignty”.[97] There are both benefits and costs to requiring local data. Overseas services are popular, with the largest offering large scale and low cost that it would be difficult to match within New Zealand. Overall, despite exceptions, TPPA rules in this area support data flows rather than data sovereignty.

Domestic regulations which limit data flows, storage or processing locations must support a “legitimate policy objective”, not be a “disguised barrier to trade” and not impose any greater restrictions than necessary to achieve the objective.[98] Given the diverse political situations of TPPA member nations, the range of desired “legitimate policy objectives” may be quite broad. Countries including Malaysia and Singapore may wish to control content for “moral reasons”, while others like Australia will want maintain local storage of health data.[99] Limiting policy moves to the minimum necessary will limit policy options for member governments, including New Zealand.

Non-discrimination

Under the TPP, digital products created or published in another TPPA member country must be treated as favourably as those created locally. There are exceptions for broadcasting, as well as subsidies and grants.[100] This is a two-edged sword, assisting with market access for New Zealand products, but also requiring competition in our local market from TPPA members. The exception mentioned should protect existing cultural institutions, such as NZ on Air, which fund distinctively New Zealand media. The allowed subsidies and grants should enable funding support for local digital media, even if these are not “broadcasting”.

Cooperation

Non-binding recognition is given to cooperation:

- Article 14.15 encourages cooperation on matters broadly related to e-commerce, such as improving business skills and exchanging information and practice, as well as self-regulation through codes of conduct and guidelines.

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97 See Marie Shroff, “Privacy and Sovereignty: Data fight or flight?”, address to GOVIS 2007, (Wellington Town Hall, 10 May 2007), < https://www.privacy.org.nz/assets/Files/7017527.doc >

98 See for example Articles 14.11, 14.13.

99 Inside U.S. Trade <http://insidetrade.com/daily-news/vietnam-malaysia-temporarily-shielded-some-e-commerce-disputes>, Nov 11 2015.

100 Article 14.4.

- Article 14.16 “recognises the importance of” building national entities for computer security incident response, and of collaboration to identify and mitigate malicious intrusions and code. New Zealand does not have a national computer security body, though steps towards one are underway.[101]

The legal framework for domestic electronic transactions, required under international law, should avoid any ‘unnecessary regulatory burden’ and facilitate the input of ‘interested persons’ into its development.[102] While not a hard obligation, it is subject to general oversight under the Agreement as well as the cooperation mechanisms.

Protecting Personal Information

The E-Commerce chapter acknowledges the need to protect personal information, but does not provide any rules to maintain privacy or give users control of their information. Provisions favour ease of transfer, and limit potential restrictions and protections for data.

Article 14.11 protects cross-border electronic transfer of information, including personal information, where transfer is for “the conduct of the business” of a covered person. Exceptions are allowed, but limited to the minimum which achieves a “legitimate policy objective”.[103] Vietnam and Malaysia have negotiated a two year transition period before open data flow rules apply,[104] suggesting that TPPA rules require a degree of openness which these less liberal nations currently lack.

Article 14.8 requires “protection of the personal information of the users of electronic commerce” through a legal framework. This apparently strong protection is modified by a footnote, and as a result, no specific privacy protections are required.[105] Member nations can adopt comprehensive privacy or data protection laws, sector-specific laws, or provide “enforcement of voluntary undertakings by enterprises”.[106]

This compares with current New Zealand law, which provides for protection of personal and private information. Under our Privacy Act,[107] we have legal rights to access information we provide to businesses and other organisations. Where we provide information for a particular purpose, our Privacy Act allows its use only for that purpose. TPPA rules do not affect that domestic regime,

101 Government efforts include “New Zealand’s Cyber Security Strategy” (June 2011) by the National Cyber Policy Office <https://www.dpmc.govt.nz/ncpo>, and the National Cyber Security Centre within the GCSB. A 12-month proof-of-concept CSIRT catering to small and medium business is being run by the NZITF, a trust-based membership group of security experts <http://www.csirt.nz/>.

102 Article 14.5.

103 Article 14.11.

104 Article 14.18. The transition period also covers “digital product” neutrality.

105 Article 14.8.

106 Chapter 14, footnote 6.

107 Privacy Act.

but also do nothing to increase protections once data is moved offshore. Provisions which favour international data flows may make it harder to adopt a different balance in future.

Under Article 14.13, governments cannot require, as a general condition of doing business in their country, that local computer facilities are used. This is a limit on potential “data sovereignty” rules, which might be adopted to protect user information. The Article does allow exceptions, but only based on a ‘legitimate public policy objective’, which is not defined. Any exception must not operate in a way which is discriminatory, or which is a disguised restriction on trade, and must impose only the minimal restriction necessary for the policy objective.

Protection of personal data is almost certainly a legitimate objective. In practice, debate under these rules would focus on what if any requirement for local data storage or processing would be necessary to serve this objective. Overseas firms and governments would point to the alternatives most convenient for them. Given that local data requirements would necessarily advantage local firms, they could also be labelled discriminatory. As elsewhere, the uncertainty and potential for ISDS under these rules may limit which policy options New Zealand considers in the future.

Consumer Protection

Article 14.2 acknowledges the importance of “consumer confidence” online.[108] However, measures to protect consumers are limited. Article 14.7 requires laws proscribing fraud and deceptive commercial activity that causes harm or potential harm to consumers online.[109] These measures deal with deliberate deception by businesses only. In practice, it will remain difficult for consumers to claim their legal rights against overseas-based businesses.

Unsolicited messages

Article 14.14 requires measures to address unsolicited messages or “spam”. Parties must adopt or maintain either an opt-out requirement, an opt-in rule for commercial messages, or measures to “otherwise provide” for reduction of unsolicited messages. In short, there is no agreed, shared standard for reducing unsolicited messages. Current New Zealand law requires that users can opt out of messages, so is at the more pro-consumer end of potential TPPA regimes.[110]

108 TPPA Chapter 14, Article 14.2.

109 Article 14.7.

110 Unsolicited Electronic Messages Act 2007 (NZ). See also the government “Anti-Spam” website <http://www.dia.govt.nz/Services-Anti-Spam-Index>

Electronic signatures

Article 14.6 requires general recognition of electronic signatures "[e]xcept in circumstances otherwise provided for under its law". Interestingly, further wording supports a free choice of authentication method by those engaged in an electronic transaction.[111] However, the required free choice can be limited "for a particular category of transactions", where a party requires authentication meet "certain performance standards" or be "certified by an authority".[112] These exceptions are likely to apply to suspected illegal transactions, as well as to regulated banking services. Current New Zealand law complies.[113]

Source Code

Software "source code" defines the behaviour of computer programs. Reading source code is important for understanding what a program does and improving it. Under Article 14.17, member nations cannot require, as a condition of access to their market, that source code for "mass market" consumer products be made available.[114] A main concern here relates to hardware products with software control systems. Many modern cars and other machines include software systems. To diagnose problems or improve performance, accessing human-readable source code may be required. Regulators might also want access to source code, for example to avoid products "cheating on tests", as Volkswagen vehicles were shown to do for emissions testing.[115] This provision is presumably intended to prevent governments or others from unfairly copying code from overseas businesses. Unfortunately, a complete ban on requiring source code for market access goes further than is needed for this aim. Legal mandates for access to source code may support user rights, and legitimate policy aims. This option will be off the table for policy in TPPA member nations.

Telecommunications Regulation

TPPA Chapter 13 is directed to extending competitive, open market norms in telecommunications.[116] Parties must implement rules that support market competition, and restrain "anti-competitive

111 Article 14.6. Blockchain systems, of the type used in BitCoin, may be an "authentication method" protected by this provision.

112 Article 14.6.

113 See Electronic Transactions Act 2002 (NZ), s 22.

114 For bespoke software and software for government use, access to source code can be required. This is in line with normal "source code escrow" to mitigate risks of a supplier going out of business or otherwise being unable to support its software.

115 BBC News, "Volkswagen: The scandal explained", 4 November 2015 <http://www.bbc.com/news/business-34324772>

116 Article 13.3.

practices".[117] TPPA members must require "major suppliers" to offer provisioning and interconnection,[118] as well as equipment co-location,[119] on favourable terms. Regulation is optional, but must be independent from major suppliers,[120] and carried out in the long-term interests of end users.[121] Both major suppliers and regulators must be "non-discriminatory".

This is consistent with New Zealand's current approach. New Zealand has been an early adopter of light-touch regulation and competitive retail markets for Internet, phone, and mobile services. Regulation is through our Commerce Commission. As with all such processes, the quality of outcomes depends on how broad is the consultation, and how robust the analysis by the decisionmaker.[122] With Telecom as an entrenched incumbent, the operation of genuine competition was limited.[123] Separation of Telecom has changed our market for the better. Overseas companies are already strong participants in our local market. Though no change is envisioned, under the TPPA New Zealand would be bound to maintain this approach. A second Telecom-style separation might be impossible.[124]

117 Article 13.8.

118 Article 13.7.

119 Article 13.13.

120 Article 13.16.

121 Article 13.3 2(c).

122 See for example InternetNZ, "Submission on the further draft pricing determination for copper", https://internetnz.nz/content/internetnz-submission-further-draft-pricing-determination-chorus%E2%80%99-unbundled-copper-local

123 Ross Paterson, "Regulation of Telecommunications: The lessons learned over the last 25 years and their application in a broadband world", Paper delivered to 22 Annual Workshop of the Competition Law and Policy Institute of New Zealand (5 August 2011), <http://www.comcom.govt.nz/dmsdocument/10988>.

124 Chapter 25 "Transparency" and Chapter 26 "Regulatory Coherence" of the TPPA would also constrain any such move.

This paper was coordinated by James Ting-Edwards[1] of InternetNZ.[2] The section on Copyright Term was authored by Melanie Johnson[3] and James Ting-Edwards; the section on Technological Protection Measures was authored by Judge David Harvey[4] and James Ting-Edwards; information on Domain Names was provided by Debbie Monahan;[5] and information on Patent Extension and Data Exclusivity was provided by Kate McHaffie[6] and Jo Shaw.[7] The paper was reviewed by Professor Matthew Rimmer.[8]

This is one of a series of research papers coordinated by Professor Jane Kelsey and Barry Coates that will be posted on www.TPPlegal.wordpress.com. The research papers have been prepared under tight time constraints and are not comprehensive. A full and independent assessment of the TPPA's likely impact on key issues, including the environment, health, social wellbeing and human rights is required. This needs to be undertaken prior to ratification of the TPPA.

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